STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2013
v	No. 308293 Livingston Circuit Court
CHARLES EVAN JONES JR., Defendant-Appellant.	LC No. 10-019020-FC

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84(a), aggravated stalking, MCL 750.411i, and making a false threat of terrorism, MCL 750.543m. Defendant was sentenced as a fourth-habitual offender, MCL 769.12, to concurrent terms of 18 to 40 years' imprisonment for each conviction. For the reasons stated in this opinion, we affirm.

I. FACTS

Defendant's convictions stem from his conduct toward his former girlfriend, hereafter the victim. During trial, the prosecution presented evidence that, after a series of violent acts and threats against the victim, some of which resulted in two earlier convictions of domestic violence, defendant sprayed the victim with an inflammable liquid and set her on fire. An acquaintance testified that, while the police were searching for defendant in connection with the latter incident, defendant stated that he was on his way to the victim's location with three cans of gas, two propane tanks, and two shotguns, and that defendant spoke of "suicide by police."

A police detective testified that defendant telephoned him and said he was going to track the victim down and blow up the bank where she worked. In an interview with the detective that followed, defendant stated that he never intended to set the victim on fire, but only wanted to spray her with perfume. Defendant stated that he suspected that the victim's cigarette caused what he sprayed on her to ignite. Defendant was convicted as previously stated, and now appeals as of right.

II. PRIOR DOMESTIC VIOLENCE

First, defendant argues that the lower court improperly admitted evidence of his previous acts of domestic violence and their underlying facts. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Before trial, the prosecution moved to introduce the testimony of some women who had previously suffered severe domestic violence at the hands of defendant pursuant to MCL 768.27b. The prosecuting attorney planned to use the evidence to prove that defendant had the intention of killing the victim when he set her on fire. The trial court granted the motion, concluding that "it would be in the interest of justice for the jury to have a bigger picture . . . for the presentation of this fairly serious case that the defendant has been charged with."

The first of these witnesses testified to a relationship with defendant dating from 1992, during which defendant once grabbed her by the forearm, and forced her into her truck, then drove off in a rage. According to the witness, he struck her with his hands, slamming her head into the passenger window, and threatened to kill her. This incident resulted in defendant's serving a term of incarceration. The witness maintained personal protection orders against defendant, who nonetheless threatened her in 2004 at her place of employment.

The second witness described a brief romance with defendant in 1996. According to this witness, defendant once threw her to the floor and dragged her by the hair across the room, and then grabbed the witness's fourteen-year-old daughter by the shoulders and threw her across the living room.

Finally, a third witness testified that she was married to defendant for a short time in the 1980s. The two lived together for about five years had a daughter together. The ex-wife stated that when defendant drank he would "fly off the handle" and "beat on" her, doing so even when she was attempting to breast feed their infant daughter. The ex-wife specified a beating that began in the bathroom, and left her covered in blood, from which she sought refuge by locking herself in her car, thinking she was going to die. According to this witness, defendant beat on the car to the point of causing it serious damage. As a result of this incident, the witness divorced defendant and obtained sole custody of their daughter. Nevertheless, defendant continued to harass his ex-wife for about five years following their divorce.

Under MCL 768.27b(1), if a defendant is accused of an offense involving domestic violence, "evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant," unless otherwise excluded under MRE 403. Unlike MRE 404(b)(1), which allows evidence of other acts to be used for purposes other than showing a propensity to commit the charged offense, MCL 768.27b(1) allows prior acts of domestic violence to be used as evidence of a defendant's character and propensity. *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008). Thus, the statute provides juries "the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Id.* at 779 (quotation marks and citation omitted).

An act of domestic violence includes "[c]ausing or attempting to cause physical or mental harm to a family or household member," or "[p]lacing a family or household member in fear of physical or mental harm." MCL 768.27b(5)(a)(*i*) and (*ii*). A "household member" includes any individual with whom the defendant "resides or resided." MCL 768.27b(5)(b)(*ii*).

If a defendant's prior acts of domestic violence occurred more than 10 years before the charged offense, they are inadmissible unless the trial court finds that admitting the evidence would be "in the interest of justice." MCL 768.27b(4).

In this case, the trial court properly admitted evidence of the earlier incidents of domestic violence under MCL 768.27b. First, all three incidents constituted acts of domestic violence, as defendant caused physical harm to all the women involved while residing in their households. The incidents are relevant, because defendant was charged with assault with intent to murder, and ultimately convicted of the lesser charge of assault with intent to cause great bodily harm less than murder. During trial, defendant's interview with a police detective was played for the jury, and during that interview, defendant suggested that the victim caught fire by accident. Thus, defendant's intent was also specifically at issue. The evidence of the earlier acts of domestic violence showed that defendant tended to injure severely his domestic partners, in some cases causing them to fear for their lives. Accordingly, evidence of all those earlier incidents tended to support the prosecution's theory that defendant extended his propensity toward domestic violence to the victim, including by intentionally setting her on fire.

Further, the trial court did not err by finding that admitting defendant's acts of domestic violence served the interests of justice, despite occurring more than 10 years before the charged offense. The evidence, considered as a whole, established a chain of conduct stretching continuously from a marriage in the late 1980's to his relationship with the victim. With the several women involved, defendant engaged in a pattern of domestic violence ever increasing in severity. Thus, the incidents gave the jury a more complete picture of defendant's conduct toward the women in his life, better allowing it to determine whether defendant intended to kill the victim by setting her on fire.

III. SUBSTITUTION OF COUNSEL

Defendant argues that the lower court improperly denied his request for substitution of counsel. We disagree. We review a trial court's decision regarding substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

At defendant's request, the trial court appointed four different attorneys to assist defendant with his defense, and defendant settled on the last of the attorneys, Heather Nalley, for a time, but then repeatedly asked that she be replaced with new counsel. Finally, the trial court granted defendant's request to represent himself, with Nalley serving as standby counsel, and this arrangement held for several months. However, within a few weeks of trial, defendant again requested appointed counsel, stating that he would accept anyone but Nalley. The trial court denied the request, advising defendant that if he desired representation, Nalley would remain his court appointed attorney.

Although an indigent defendant is guaranteed the right to counsel, such a defendant is not necessarily entitled to have appointed counsel of his or her choosing. *Traylor*, 245 Mich App at 462. A substitution of appointed counsel is warranted only upon a showing of good cause, and where substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists where a legitimate difference of opinion develops between the defendant and appointed counsel with regard to fundamental trial tactics. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (citation and quotation omitted).

In this case, defendant requested a waiver of counsel on the grounds that Nalley did not spend adequate time preparing his defense, failed to file motions he requested, failed to retrieve evidence he suggested, and released documents to an expert witness without authorization. The trial court properly found that none of these issues constituted proper cause for substitution of counsel. The choice of theories to pursue, and the preparation of an expert witness, are matters of professional judgment and trial strategy rightfully entrusted to the attorney. *Traylor*, 245 Mich App at 463. Further, defendant's general complaints about Nalley's dedication or case preparation do not warrant good cause for substitution of counsel. See *Strickland*, 293 Mich App at 398. Moreover, Nalley was defendant's fourth attorney. Granting defendant yet another substitution of counsel would have unreasonably disrupted the judicial process.

IV. SUPPRESSION HEARING

Defendant argues that the trial court erred by denying his motion to suppress statements that he made to the police after he was arrested because his statements were made in violation of his *Miranda*[1] rights. We disagree. In reviewing a trial court's determination whether a defendant offered a valid waiver of his or her rights to remain silent, or to have an attorney present for questioning, we review the trial court's factual findings for clear error and its legal conclusions de novo. See *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

Under the United States and Michigan Constitutions, no person may be compelled to be a witness against him- or herself in a criminal trial. US Const, Am V; Const 1963, art 1, § 17. This right has been expanded beyond the trial to include all situations in which an individual might be compelled to incriminate himself. See *People v Honeyman*, 215 Mich App 687, 694; 546 NW2d 719 (1996). Thus, statements "of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). Where an alleged *Miranda* waiver is challenged, the prosecution must show that the defendant's wavier was valid by a preponderance of the evidence. *Daoud*, 462 Mich at 634. In doing so, it must establish that the defendant "understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id.* at 637 (quotation and citation omitted).

Once a defendant invokes *Miranda* rights, the police must cut off further questioning and refrain from repeated efforts to change the defendant's mind. *People v Slocum (On Remand)*,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

219 Mich App 695, 699-700; 558 NW2d 4 (1996). Still, an invocation of *Miranda* rights does not provide "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances . . . ." *Id.* at 699 (quotation marks and citation omitted). Such a prohibition would prevent the police from engaging in legitimate investigative activity, and would "deprive suspects of an opportunity to make informed and intelligent assessments of their interests. *Id.* (quotation marks and citation omitted). Thus, a "custodial statement obtained after a person decides to remain silent is admissible" if police "scrupulously honor" the defendant's right to cut off questioning. *People v Williams*, 275 Mich App 194, 198; 737 NW2d 797 (2007). In determining whether the police scrupulously honored a defendant's right to cut of interrogation, the trial court should consider whether significant time elapsed since the defendant invoked the right to remain silent, and whether the police repeated the advice of *Miranda* rights. *Id.*

At the hearing regarding defendant's motion to suppress, officer Gary Mitts testified that he and another officer were sent to the Wexford County Jail to pick defendant up and transport him to the Livingston County Jail. The officers took defendant into custody and began the transport at about 5:30 p.m. Mitts testified that as soon as defendant was placed in the back of the patrol car he was read his *Miranda* warnings. Defendant stated that he knew his *Miranda* rights, and when asked specifically what the rights entailed he stated that "it means I can keep my mouth shut if I want to." The officers made no attempt to interrogate defendant during the transport from Wexford County to Livingston County; however, after about 45 minutes defendant began asking the officers questions. After defendant started initiating conversation, Mitts testified that he informed defendant that if defendant wanted to talk he would read defendant his *Miranda* rights again and then they would both ask questions. Defendant then stated "I'm not sayin' nothing." No further attempts to question defendant or obtain a waiver of his rights were made by the transport officers.

Detective David Fogo also testified at the suppression hearing. He testified that he interviewed defendant at the Livingston County Jail sometime "before lunch" the day after defendant was taken into custody and transported from Wexford County. Fogo testified that the interview lasted about 30 to 40 minutes, and that defendant appeared calm, seemed to understand everything that was going on, and seemed eager to talk to him. Fogo testified that at the beginning of the interview he asked defendant whether defendant "recalled Officer Mitts advising him of his *Miranda* rights the day before," and defendant stated that he "understood the rights." Fogo testified that he "clarified" that defendant understood his rights and then specifically asked defendant "if he wanted to talk," and defendant said "yes."

The trial court denied defendant's motion to suppress, concluding that

> from the short amount of video that we watched from May the 4th when he was picked up from the Wexford County Jail, it was clear to mean [sic], and I so find, that Mr. Jones was aware of the rights; he knew what the rights were. And he exercised the right not to talk to the officer about the incident. Said he could be silent; he was silent.

* * *

> . . . I am going to deny the motion by the Defendant. I do find that Mr. Jones had a knowing of [sic] the—his rights. That he was in a condition or a state of mind at—that they were voluntarily done. I don't find his elaborate discussion during the half hour video that we watched of the May 5th interview showed anything but a person that responded clearly, coherently, understandingly, intelligently, to the questions . . . that were asked.

On appeal, defendant argues that the trial court erred by denying his motion to suppress the statements he made during the interview with Detective Fogo. Specifically, defendant argues that he invoked his right to remain silent during transport, and that Detective Fogo failed to scrupulously honor his invocation of his right to remain silent.

At the outset, we question whether defendant ever actually invoked his right to remain silent under the circumstances of this case. It is clear from the testimony at the hearing that the transport officers did not intend to interrogate or attempt to interrogate defendant. Nor did the officers specifically ask defendant to waive his *Miranda* rights. Nevertheless, even assuming defendant properly invoked his rights during transport, we find no *Miranda* violation.[2] The first attempt to interrogate defendant did not occur until the day after he was transported and first read his *Miranda* rights. Further, before Detective Fogo conducted the interrogation, he clarified that defendant understood his *Miranda* rights and was willing to waive them. Defendant acknowledged that he had been read his *Miranda* rights before the interview was conducted, and he further acknowledged that he understood his rights, but wanted to talk to Detective Fogo. While defendant denies Detective Fogo's account of what happened, claiming that he did not agree to speak to the detective and noting that no recording verifies the detective's account, the trial court was free to judge the credibility of the witnesses. *Gipson*, 287 Mich App at 264 (holding that "[d]eference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses"). Moreover, defendant cites no authority for the proposition that the police are required to create electronic records of such waivers.[3]

Thus, we conclude that there was no *Miranda* violation and suppression was properly denied. The police scrupulously honored defendant's *Miranda* rights because defendant clearly understood his rights and agreed to talk to the detective and there was a significant lapse of time between defendant's first invocation of his right to remain silent and the subsequent attempt to obtain a waiver. See *Williams*, 275 Mich App at 199 (holding that police scrupulously honored the defendant's rights when police waited 10 hours to attempt to question the defendant after his invocation of his right to remain silent).

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[2] We note that neither party argues on appeal that defendant failed to properly invoke his right to remain silent.

[3] See *People v Fike*, 228 Mich App 178, 186; 577 NW2d 903 (1998) ("we cannot say that the failure of the police to electronically record defendant's confession was so 'fundamentally unfair' that the concept of justice was offended").

Defendant alternatively argues that the trial court erred by proceeding with the suppression hearing in reliance on his continued insistence on self-representation. We disagree.

At the beginning of the suppression hearing, the trial court reminded defendant that he was entitled to appointed counsel:

> *Q.* Mr. Jones, you understand you do have the right to an attorney?
>
> *A.* Yes, sir.
>
> *Q.* If you can't afford one I would put Ms. Nalley back on the case for you; you understand that?
>
> *A.* Yes, sir.
>
> *Q.* And that would be at public expense; you understand that?
>
> *A.* Yes, sir.
>
> *Q.* You understand the maximum possible punishment on this case is up to life in prison?
>
> *A.* Yes, sir.
>
> *Q.* You understand, and . . . I'll express it here again today, in the opinion of the Court you're doing yourself a disservice by representing yourself—not availing yourself of an attorney to assist you. I'm not asking for you to comment on that. You have exercised your constitutional right to represent yourself. I've told you in the past that I respect that. Knowing these things, Mr. Jones, do you wish to continue representing yourself or do you wish to avail yourself of an attorney?
>
> *A.* Represent myself.

The trial court accepted defendant's waiver of counsel and proceeded with the hearing.

A criminal defendant has a constitutional right to counsel at all critical stages of the legal process. US Const, Am VI; Const 1963, art 1, §§ 13, 20. See also MCR 6.005(D). This reflects the "obvious truth that the average defendant does not have the professional legal skill to protect himself." *Maine v Moulton*, 474 US 159, 169; 106 S Ct 477; 88 L Ed 2d 481 (1985) (quotation and citation omitted). Still, courts may not force a lawyer upon a defendant who wishes to waive representation and act *in propria persona*. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

In striking a balance between these two conflicting concerns, a trial court must ensure that the defendant's waiver request is unequivocal. *Id.* at 642. The court must also ensure that the defendant's waiver request is knowing, intelligent, and voluntary. *Id.* The court must further ensure that the defendant's self-representation will not disrupt, unduly inconvenience, or burden

the proceedings. *Id.* In criminal proceedings, a court deciding whether to allow self-representation must comply with the procedures set forth in MCR 6.005(D)(1), which call for the court to advise the defendant of the charge, the maximum possible sentence, any mandatory minimum sentence, and the risks involved in self representation. *Id*. at 642, 646.

The propriety of a defendant's waiver of counsel depends not on "what the court says, but rather, what the defendant understands." *People v Adkins*, 452 Mich 702, 723; 551 NW2d 108 (1996), overruled in part on other grounds by *Williams*, 470 Mich at 641 n 7. Because the trial court is in the best position to make this determination, its method of satisfying these requirements should not be subjected to excessive scrutiny. See *Adkins*, 452 Mich at 725-727. A trial court may validly accept a waiver of the right to counsel if it substantially complies with the dictates of *Williams* and MCR 6.005(D)(1). *Williams*, 470 Mich at 647.

In this case, defendant was given several opportunities to proceed with appointed legal representation. Before beginning the suppression hearing, the trial court informed defendant that he had a right to an attorney at public expense, and offered to reappoint attorney Nalley if he wanted counsel, and also reminded defendant that he was vulnerable to life imprisonment. Further, the trial court expressed its opinion that defendant was doing himself a disservice by insisting on self-representation. Nonetheless, when the trial court asked defendant if he wanted to continue *in propria persona*, defendant responded unequivocally, "yes, sir." The trial court substantially complied with *Williams* and MCR 6.005(D)(1), and thus properly accepted defendant's waiver of counsel.

Moreover, to the extent that defendant is arguing that the trial court erred by forcing defendant to choose between self-representation and the services of Nalley, we find no error for the same reasons that we concluded that the trial court did not err by refusing to appoint a fifth public defender as defendant's attorney, as discussed *supra*.

IV. ASSISTANCE OF COUNSEL

Finally, defendant claims that he is entitled to a new trial because Nalley, while serving as his legal representative, was ineffective. We disagree. Because defendant did not raise this challenge below, and there has been no *Ginther*[4] hearing to develop the issue, our review is limited to mistakes apparent on the existing record. *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Michigan has long recognized the importance of a criminal defendant's right to representation at trial. *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). The right

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

to effective assistance of counsel is grounded in the United States and Michigan Constitutions.[5] US Const, Am VI; Const 1963, art 1, § 20.

Courts generally presume that counsel has provided effective assistance, and the defendant bears the burden of overcoming that presumption. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, the defendant "must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms[,] . . . (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

Counsel generally has a duty to advocate the defendant's cause, consult with the defendant on important decisions, keep the defendant informed of significant developments in the case, and "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). But, "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. Trial strategy can involve the presentation of evidence, examination of witnesses, and closing arguments. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant argues that defense counsel was ineffective for inadvertently eliciting prejudicial information from two different witnesses. Defendant first cites an exchange that took place during cross-examination of the victim:

> *Q.* Okay. And had you known about Mr. Jones' history with other women?
>
> *A.* No, I did not.
>
> *Q.* You had no idea?
>
> *A.* I don't know details. Soon after we met he told me that he was—I mean I knew about other women.
>
> *Q.* Did you ever know that he was domestically violent with any other women?

[5] The "intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." *Pickens*, 446 Mich at 302.

A. Now, that's . . . a hard answer. And the reason why is because I didn't know details and I never went to the trouble of tryin' to find 'em. I wanted to really see the good in Charlie. However, he was honest with me in the beginning and he did say that he had been in trouble.

Q. Specifically for harming women. Whether you know details or not you did know that he had a past of harming women, isn't that correct?

A. No, I would say I didn't know that. I didn't know that he hurt women per se. I knew from being divorced myself that . . . it's a difficult time. And the things that he told me were not him actually hurting other women. And—

Q. So, you never knew about his convictions?

A. I knew that he had—I read on—there's a website and I have seen it. And it describes that he had DIU's, forgery, and attempted kidnapping.

Q. And—

A. And—

Q. —domestic violence, correct?

A. No, I never saw that.

Defendant also cites testimony from Dr. David Manuta, who testified as an expert in the scientific and chemical nature of the cause and origin of fire, the scientific nature of fire and explosions, chemical engineering, and thermodynamics. At a pretrial *Daubert*[6] hearing testing Manuta's qualifications, the following exchange occurred during defense counsel's direct examination:

Q. And what do you mean that it doesn't support? Are you using a different word than a legal word that a jury might say in evidence supports; how do you mean that word support?

A. [T]he materials that Mr. Jones was planning on using to a reasonable degree of scientific certainty could not [cause] the damage that other chemicals, which unfortunately have been used in terroristic threats around the world or—events that we have subsequently tied to terrorist groups . . . .

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[6] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Q. . . . Did you get that information from the paperwork as to what is alleged or did the Defendant confess . . . to using anything? Where's your information derived from is what I'm asking.

A. Okay. He . . . acknowledged what he was planning on using. Plus if I went through all the file records there is some written documentation on using gasoline. I believe he talked about using some of the small propane tanks. And so, there is some documentation of that threat.

Q. That is what I wanted to make clear.

Defense counsel then attempted to make a special record in order to clarify that defendant did not confess to making any threats while working with Manuta:

I'm actually attempting to make somewhat of a special record so that there's no allegation that this was some sort of statement by my client. This came from a police report and he's indicating it's from the documents. And it is an allegation made by other people that he made these statements. I do not want there to be confusion on the record that my witness is saying that the Defendant confessed to that. . . . I'm not sure that that's coming through.

Defense counsel then attempted to clarify Manuta's statements:

Q. So, the documents you read are police reports, correct?

A. That's correct.

Q. And were you stating that somehow trying to infer to the Court, or to the prosecutor, or myself that the Defendant confessed to you in any way or were you referring to the police reports?

A. In . . . this case it's really a little bit of both because certainly reading the documents, getting a sense of the time line, getting a sense of the players. But my recollection in our discussions is that he did not deny any of that. And as a matter of fact, although we didn't discuss quantities of fuel, he certainly acknowledged that he had certainly thought about making those purchases.

At trial, the prosecuting attorney cross-examined Manuta regarding any admissions defendant may have made during their previous discussions. Manuta stated that he could not recall. The prosecuting attorney then impeached Manuta with his testimony from the *Daubert* hearing.

We conclude that neither alleged instance of defense counsel's elicitation of prejudicial testimony fell below an objective standard of reasonableness, nor has defendant demonstrated that either instance affected the outcome of the proceedings.

Defense counsel did not in fact elicit the victim's testimony concerning defendant's earlier forgery or drunken driving convictions. Defense counsel specifically asked the victim

about defendant's history and convictions for "hurting women." Her answer volunteering information concerning defendant's unrelated convictions was thus nonresponsive. Further, defendant suffered no prejudice as a result. The jury already knew that defendant had multiple convictions resulting from his previous domestic violence incidents. It is not likely that learning of a few of defendant's drunken driving and forgery convictions, in addition to defendant's history of convictions relating to domestic violence, removed reasonable doubt the jury entertained concerning defendant's guilt.

Further, defendant's theory concerning defense counsel's preparation for Dr. Manuta's testimony is speculative. Defendant himself proclaims that he never told Manuta that he threatened to blow up the bank. That being defendant's position, he can hardly characterize defense counsel as ineffective for failing to anticipate that Manuta would attribute to him a false confession in that regard at the preliminary examination, let alone that the testimony would make its way into trial in response to Manuta's eventual trial testimony. Further, even if it were error on defense counsel's part that introduced the specter of defendant's scheming to attack the bank at which the victim worked, any such error was harmless. Two other witnesses, an acquaintance and a police detective, testified that defendant had threatened to blow up the bank. In light of this evidence submitted during trial, defendant has failed to demonstrate that any additional testimony would have affected the outcome of the proceedings.

For these reasons, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra